

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES DEAN,)	
)	
Plaintiff,)	
)	Case No. C05-1949-JCC-JPD
v.)	
)	
JO ANNE B. BARNHART, Commissioner)	REPORT AND RECOMMENDATION
of Social Security Administration,)	
)	
Defendant.)	
_____)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff Charles Dean appeals a final decision of the Commissioner of the Social Security Administration (“Commissioner”), that denied his application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act after a hearing before an administrative law judge (“ALJ”). The parties agree that the ALJ’s decision was not free from legal error and that some form of remand is appropriate. For the reasons set forth below, the Court recommends that the ALJ’s decision be reversed and remanded for further administrative proceedings. On remand, the ALJ should update plaintiff’s medical records, reevaluate the medical evidence, reassess plaintiff’s credibility, apply the special technique for evaluating mental impairments described in 20 C.F.R. § 404.1520a, give proper weight to the Veterans Administration’s disability determination, and apply all appropriate steps of the

sequential-evaluation process necessary to determine whether plaintiff's severe impairments render him disabled for purposes of DIB.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a sixty-two-year-old man with sixteen years of education, including a Bachelor of Arts degree in Christian ministry. AR 62, 102, 478. Plaintiff served in the United States Army and saw a significant amount of combat during the Vietnam War.¹ AR 302, 445. After concluding his tour of duty, he fled to Canada in 1969 to avoid participating in covert operations in Vietnam. AR 445. He returned to the United States in 1975 and received an honorable discharge. *Id.* Aside from his military service, plaintiff's past work history primarily consists of telephone sales and work in the publishing industry.² AR 97, 142.

On January 14, 2003, plaintiff filed an application for DIB. AR 62-64. Although he alleged disability beginning on February 28, 2002, as a result of post-traumatic stress disorder ("PTSD") and high blood pressure, he also alleged that he had experienced symptoms of PTSD as early as 1966. AR 96. Plaintiff's applications were denied both initially and upon reconsideration. AR 33-39.

Plaintiff requested a hearing and on January 19, 2005, an administrative hearing was held before an ALJ. AR 40, 475-541. On April 8, 2005, an ALJ issued a decision finding plaintiff not disabled. AR 19-30. In particular, the ALJ found at step two that plaintiff did not have a severe mental or physical impairment that limited his ability to perform basic work activities, including his past relevant work. AR 29-30.

¹There is conflicting information regarding plaintiff's service dates. Although certain Veterans Administration documents indicate plaintiff served from 1963 to 1975, others indicate it was from May 12, 1965, to April 14, 1966. *Compare* AR 332 and 445. His application for DIB indicates he served only from February 24, 1964, to February 23, 1967. AR 62.

²Dr. Hohenegger's notes indicate plaintiff has had as many as 60 jobs. AR 447.

01 Plaintiff appealed the decision to the Appeals Council. AR 7-14. On appeal, Dr.
02 Monroe Neuman, a non-examining physician appointed by the Appeals Council, reviewed
03 the record and opined that plaintiff's PTSD was severe, but that he did not satisfy a listing
04 and that "work would not be precluded." AR 6A-B. The Appeals Council declined to
05 review plaintiff's request for review. AR 4-6. Therefore, the ALJ's January 19, 2005,
06 decision serves as the Commissioner's final decision for purposes of judicial review. On
07 November 21, 2005, plaintiff filed this suit challenging the ALJ's final decision. Dkt. No. 1.

08 III. JURISDICTION

09 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §
10 405(g) (2005).

11 IV. STANDARD OF REVIEW

12 The Court may set aside the Commissioner's denial of social security benefits when the
13 ALJ's findings are based on legal error or not supported by substantial evidence in the record
14 as a whole. *See* 42 U.S.C. § 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993);
15 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as
16 more than a mere scintilla but less than a preponderance; "it is such relevant evidence as a
17 reasonable mind might accept as adequate to support a conclusion." *Magallanes v. Bowen*,
18 881 F.2d 747, 750 (9th Cir. 1989) (internal citations and quotations omitted). The ALJ is
19 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
20 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is
21 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
22 must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citations
23 omitted).

24 V. EVALUATING DISABILITY

25 As the claimant, Mr. Dean bears the burden of proving that he is disabled within the
26 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)

(internal citations omitted). Disability is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months[.]” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled only if his impairments are of such severity that he is not able to do his previous work, and cannot, considering his age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. *See* 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Social Security regulations set out a five-step sequential-evaluation process for determining whether a claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that he is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the claimant establishes that he has not engaged in any substantial gainful activity, the Commissioner proceeds to step two. At step two, the claimant must establish that he has one or more medically-severe impairments, or combination of impairments, that limit his physical or mental ability to do basic work activities. If the claimant does not have such impairments, he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner moves to step three to determine whether the impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant who meets or equals one of the listings for the required twelve-month duration requirement is disabled. *Id.*

When the claimant’s impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). The Commissioner then uses the RFC to determine whether the claimant can still perform the

physical and mental demands of his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is not able to perform his past relevant work, the burden shifts to the Commissioner at step five to show that the claimant can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

VI. DECISION BELOW

On January 19, 2005, the ALJ issued a decision finding:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through the date of the decision.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's medically determinable Post Traumatic Stress Disorder is not "severe" since it does not significantly limit his physical or mental ability to perform basic work activities (20 CFR § 404.1521(a)).
4. Since the claimant is able to perform basic work activities, his medically determinable impairment does not preclude him from performing his past relevant work in telephone sales. SSR 96-3p.
5. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR § 404.1520(f)).

AR 29-30.

VII. ISSUES ON APPEAL

The parties agree that the ALJ's decision was not free from legal error and that remand is appropriate. *See* Dkt. Nos. 12, 14. The only remaining issue is whether to remand for an immediate award of benefits or for further administrative proceedings.

VIII. DISCUSSION

The Court may direct an award of benefits where “the record has been fully developed and further administrative proceedings would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen*, 80 F.3d at 1292). The Court may find that this occurs when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant’s evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant’s evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three prongs are met).

A. The ALJ Committed Legal Error.

The first step for determining whether a case should be remanded for an immediate award of benefits or for further administrative proceedings is to assess whether the ALJ provided legally sufficient reasons for rejecting plaintiff’s evidence. *McCartey*, 298 F.3d at 1076. The Commissioner has conceded that the ALJ “erroneously concluded the sequential evaluation process at step two” and that the decision “was not free from legal error.” Dkt. No. 13 at 4 & n.1. Hence, the parties agree that the ALJ committed legal error and that remand is appropriate. The first step of the remand analysis is satisfied.

Typically, the Court will analyze which of plaintiff’s assigned errors were erroneous or not supported by substantial evidence based upon the arguments in the parties’ briefs. However, the defendant has not identified the specific legal deficiencies in the ALJ’s decision, nor seriously contested the plaintiff’s assertions of error. Rather, defendant has suggested general points for reconsideration. *See* Dkt. No. 13. Given the ambiguity of the Commissioner’s response and her recommendations for remand, the ALJ should take the following actions on remand (1) update plaintiff’s medical records; (2) reevaluate the medical evidence; (3) reassess plaintiff’s credibility; (4) follow the “special technique” for

01 evaluating mental impairments described in 20 C.F.R. § 404.1520a; (5) give weight to the
02 Veterans Administration's disability determination in accordance with *McCartey*; and (6)
03 apply all appropriate steps of the sequential-evaluation process to determine whether
04 plaintiff's severe impairments render him disabled for purposes of DIB.

05 B. Outstanding Issues Still Remain.

06 The second step for determining whether a case should be remanded for an immediate
07 award of benefits or for further administrative proceedings is to assess whether there are any
08 outstanding issues that must be resolved before a determination of disability can be made.
09 *McCartey*, 298 F.3d at 1076. Here, several outstanding issues remain.

10 One of the predominant issues remaining is whether plaintiff meets or equals one of
11 the listings at step three. Treating psychologist Scott Michael, Ph.D, opined that plaintiff
12 equaled Listing 12.06 for Anxiety Related Disorders. AR 459-74. Nevertheless, there are
13 other medical opinions that indicate plaintiff experienced only mild to moderate limitations
14 and that suggest he may have a greater capacity for work. *See* AR 149-62, 293-96. There is
15 also evidence that plaintiff could perform at least part-time work and that his condition would
16 improve with continued treatment. AR 147, 444. Additionally, as the ALJ observed, there is
17 evidence to suggest plaintiff copes fairly well with his impairments. AR 28-29. However,
18 because the ALJ found plaintiff disabled at step two, he did not proceed to step three and
19 analyze whether plaintiff met or equaled a listing.

20 Similarly, the ALJ's failure to calculate plaintiff's RFC is an outstanding issue that
21 suggests an immediate award of benefits is inappropriate at this time. Again, because the
22 ALJ found plaintiff not disabled at step two, he never evaluated plaintiff's RFC. As a result,
23 it is impossible to determine whether plaintiff is capable of performing his past relevant
24 work, nor is it possible to determine whether he is able to perform other work that exists in
25 significant numbers in the national economy. Because there is a substantial amount of
26 conflicting evidence in this more than 500-page record, and because there are no substantive

findings past step two, significant questions remain regarding plaintiff's ability to perform various work activities. These are outstanding issues that are best resolved at the administrative level.

C. It Is Not Clear From the Record That the ALJ Would Be Required to Find the Plaintiff Disabled.

The final step for determining whether a case should be remanded for an immediate award of benefits or for further administrative proceedings requires the Court to assess whether the ALJ would be obligated to find the claimant disabled if he considered the erroneously-rejected evidence. *McCartey*, 298 F.3d at 1076-77. This prong is actually a subcategory of the second prong. *Harman*, 211 F.3d at 1178. Accordingly, if there are outstanding issues, it is unlikely that a clear finding of disability would be required.


Plaintiff argues that the Court should find him disabled and award benefits based on Dr. Michael's opinion that plaintiff met Listing 12.06, and upon the Veterans Administration's disability rating. Dkt. No 14 at 2-3. As discussed above, substantial questions remain regarding plaintiff's RFC and its impact on plaintiff's ability to perform work. The absence of any post-step-two administrative findings combined with the large and conflicting record suggests it is premature for the Court to award benefits at this time. There are substantial questions regarding proper interpretation of the available evidence. That is for the ALJ to determine on remand.

IX. CONCLUSION

For the reasons discussed above, this case should be reversed and remanded for further administrative proceedings not inconsistent with this report and recommendation. In particular, the ALJ should update plaintiff's medical records, reevaluate the medical evidence, reassess plaintiff's credibility, apply the special technique for evaluating mental impairments, give proper weight to the Veterans Administration's disability determination, and apply and all appropriate steps of the sequential evaluation process to determine whether

01 plaintiff's severe impairments render him disabled for purposes of DIB. A proposed order
02 accompanies this report and recommendation.

03 DATED this 14th day of June, 2006.

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05 JAMES P. DONOHUE
06 United States Magistrate Judge
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